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COURT OF CRIMINAL APPEALS
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No. PD-1226-18

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COURT OF CRIMINAL APPEALS
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In the Texas Court of Criminal Appeals

MARK DAVID ZIMMERMAN, Appellant,

v.

STATE OF TEXAS, Appellee.

On Petition for Discretionary Review from the
Fifth Court of Appeals in Dallas
COA No. 05-17-00492-CR
Tr. Ct. No. 067724

APPELLANT'S REPLY BRIEF

ORAL ARGUMENT NOT REQUESTED

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ARGUMENT IN REPLY

In his initial brief, Mr. Zimmerman argued that the court of appeals erred by affirming the trial court's denial of his motion to suppress because the arresting officer did not have specific, articulable facts to prolong his detention after the mission of traffic stop was complete. *See* Appellant's Initial Br. 16-23. The State raises two points in its brief that warrant Appellant's reply.

1. By relying on the excerpt from the lower court's opinion, the State asks this Court to ignore the standard of review and add facts to justify the trial court's denial of Appellant's motion to suppress.

In its responsive brief, the State uses an excerpt from the court of appeals' opinion to support its contention that there was reasonable suspicion to prolong Appellant's detention beyond the mission of the traffic stop. *See* State's Br. 9. However, this excerpt from the court's opinion misrepresents the record and consequently fails to apply the proper standard of review. *See* Appellant's Initial Br. 20-22.

When a trial court's ruling on a motion to suppress is challenged and there are no findings of historical facts, the appellate court must infer factual findings implicit in the trial court's conclusions as long as the findings are supported by the record. *Hereford v. State*, 339 S.W.3d 111, 118 (Tex. Crim. App. 2011). Whether the facts known to the officer at the time of detention amount to reasonable suspicion is a mixed question of law that is reviewed *de novo* on appeal. *State v. Kerwick*, 393

S.W.3d 270, 273 (Tex. Crim. App. 2013); *see also United States v. Sandoval*, 29 F.3d 537, 544 (10th Cir. 1994) ("'Reasonable suspicion' is a question of law for the court, and where it is absent law enforcement officers can only be said to be acting on an impermissible hunch.").

The lower court impermissibly added facts not considered by Goodman to justify its holding. The record shows that Officer Goodman did not consider Appellant's late-night travel or demeanor as being out of the ordinary, and Goodman did not know that Appellant had only a backpack for his clothes until *after* Appellant exited the vehicle to answer additional questions. *See* Appellant's Initial Br. 20-22 (highway where Appellant stopped is traveled heavily at night [5 RR 42]; Appellant's demeanor was appropriate [2 RR 25-26]; and backpack contained clothes discussed after Appellant exited vehicle [State's Ex. 2]). Because the appellate court used information that Goodman did not deem suspicious and information Goodman learned after Appellant exited the vehicle, the lower court failed to properly apply the standard of review and violated this Court's holding in *Duran v. State*, that information "acquired or noticed after a detention or arrest cannot be considered." *See Duran v. State*, 397 S.W.3d 563, 569-70 (Tex. Crim. App. 2013) ("post-hoc" rationalization for detention cannot be based on information learned after the detention). Accordingly, the court of appeals' holding is improper.

2. The State's reliance on the record's silence is a red herring.

The State argues that "the record does not reveal whether Goodman intended to issue a warning, written or oral," and then suggests that Goodman's traffic investigation was still underway when he ordered Appellant to exit the vehicle. *See* State's Br. 18. This argument is a red herring because Officer Goodman's authority to detain Appellant does not hinge on whether he intended to issue an oral or written warning for the defective license plate light. An officer's authority for a traffic stop ends "when tasks tied to the traffic infraction are—or reasonably should have been—completed. *United States v. Rodriguez*, 135 S. Ct. 1609, 1614 (2015).

Goodman admitted that the mission of a traffic stop ends "after I check the driver's license, vehicle insurance, driver's history, warrant history, whatnot." 2 RR 38. Thus, even if Goodman's intent was significant for a *Rodriguez* analysis, his own testimony confirms that the mission of his traffic stop was complete when all of Appellant's checks came back clean—before Appellant exited the vehicle. *See* Appellant's Initial Br. 17 (citing *Rodriguez*, 135 S. Ct. at 1613).

The State argues that Goodman was authorized to prolong Appellant's detention because he "knew" (1) "the facts" about Appellant's criminal history, (2) that Appellant had been untruthful, and (3) that the amount of luggage was inconsistent with Appellant's trip. State's Br. 18. However, the record is not as clear as the State contends because (1) Goodman *did not actually know* whether

Appellant's felony offenses were convictions or arrests [Appellant's Initial Br. 5-6; 2 RR 12]; (2) Goodman *did not actually know* if Appellant's statement that the last time he had trouble with the law "eight or nine years ago" was true or false because dispatch provided no dates for Appellant's criminal history [Appellant's Initial Br. 19; 2 RR 12, State's Ex. 2, 8:45]; (3) because Goodman *did not actually know* whether the felony offenses relayed by dispatch were convictions or arrests, he *could not know* whether Appellant's description of his criminal history was true or false; and (4) Goodman *did not actually know* that Appellant had clothes in a backpack for his trip until *after* he had Appellant exit the vehicle to answer additional questions [*see infra* at 2, State's Ex. 2].[1]

Because the mission of the traffic stop was complete after Goodman checked Appellant's "driver's license, vehicle insurance, driver's history, warrant history, [and] whatnot," and because Goodman did not actually know the facts as cited in the State's brief, he had no authority to prolong Appellant's detention under *Rodriguez. See Rodriguez*, 135 S. Ct. at 1614 (authority for traffic stop ends when tasks tied to infraction are complete). By having Appellant exit the vehicle and conducting a dog sniff, Goodman engaged in an unlawful fishing expedition in hopes of finding

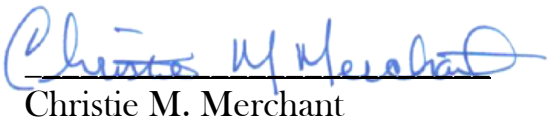
[1] As set forth in Appellant's Initial Brief, Goodman testified that he saw a small bag in the floorboard of Appellant's vehicle (2 RR 12), but Goodman also did not look inside the vehicle "very hard," if at all, prior to receiving the criminal history results from dispatch. *See* Appellant's Initial Br. 21; State's Ex. 2, 4:45 ("I didn't see any luggage in the car. Nothin.' I didn't look in the very back too hard though. There might be something back there.").

evidence of unrelated criminal activity. *See Davis v. State*, 947 S.W.2d 240, 243-44 (Tex. Crim. App. 1997) (holding that facts must amount to more than mere hunch or suspicion and that a traffic stop may not be used as a fishing expedition for unrelated criminal activity). Because Goodman had nothing more than a mere hunch that criminal activity was afoot, his prolonged detention was without authority, illegal, and unconstitutional under *Rodriguez.*

CONCLUSION AND PRAYER

For the reasons set forth in Appellant's Initial and Reply briefs, Appellant prays this Court will **SUSTAIN** his sole issue on appeal, **REVERSE** the lower court's judgment in whole, and **REMAND** the case so that the charges arising out of Appellant's unconstitutional detention may be dismissed.

Respectfully submitted,



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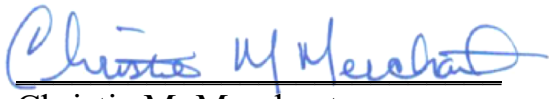
CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Appellant's Brief has been forwarded to the Grayson County District Attorney's Office and Office of the State Prosecuting Attorney on September 24, 2019 via EfileAndServe.



Christie M. Merchant

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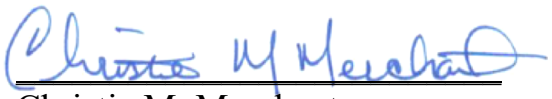

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